Sulaiman bin Mohamad v Malayan Banking Bhd

HIGH COURT (KUANTAN) — ORIGINATING SUMMONS NO 25–2 OF 1991
LAMIN J
19 SEPTEMBER 1991

***Civil Procedure** — Appeal — Appeal to High Court where judgment sum did not exceed $10,000 — Magistrate dismissing application to set aside judgment for payment of a sum — Statute providing in effect that no appeal shall lie unless there exists a question of law — Registrar of Subordinate Courts refusing to register notice of appeal because judgment sum was less than $10,000 — Whether appeal may lie — Courts of Judicature Act 1964 s 28(1) — Rules of the Subordinate Courts 1980 O 49 rr 2(1), 3 & 3A(1)*

The applicant was one of the defendants in an action in the magistrate's court in which the respondent had obtained judgment in default of appearance. The applicant's application to the magistrate for an order to set aside the judgment was dismissed. His solicitors filed a notice of appeal against the magistrate's decision but the Registrar of the Subordinate Courts refused to register the notice on the ground that the judgment sum was less than $10,000. The applicant applied to the High Court for an order, inter alia, that the registrar do receive and register the notice of appeal.

It was contended for the applicant that although the judgment sum was less than $10,000, he could still proceed with the appeal on a question of law as provided under s 28 of the Courts of Judicature Act 1964 ('the Act'). It was also contended that the registrar should not and could not determine the issue as to whether there existed a question of law or not because at the time of filing the notice of appeal, the memorandum of appeal, the notes of evidence, and even the grounds of judgment were not before the registrar to enable him or her to determine as to whether there was a question of law to be decided by the High Court. It was contended that such a question could only be decided by the High Court.

Held, dismissing the application:

(1) An appeal is said to lie to the High Court within the meaning of s 28 of the Act when the Registrar of the High Court receives the record of appeal and enters it in a list of appeals.

(2) The Registrar of the High Court shall not have sight of the appeal record if any one of the two qualifications in s 28 is not fulfilled. By implication therefore the registrar of the court below must have the power to decide whether the notice of appeal on the face of it carries any of the qualifications so that it can be accepted for filing.

[Bahasa Malaysia summary

Pemohon ialah seorang daripada defendan dalam tindakan di mahkamah majistret di mana responden telah mendapat penghakiman

ingkar kehadiran. Permohonan pemohon kepada majistret untuk perintah mengetepikan penghakiman itu telah ditolak. Peguam beliau telah memfailkan satu notis rayuan terhadap keputusan majistret tetapi Pendaftar Mahkamah Rendah enggan mendaftar notis itu atas alasan bahawa jumlah wang penghakiman adalah kurang daripada $10,000. Pemohon telah memohon kepada Mahkamah Tinggi untuk perintah, antara lain, supaya pendaftar menerima dan mendaftar notis rayuan itu.

Telah dihujahkan bagi pihak pemohon bahawa walaupun jumlah wang penghakiman itu adalah kurang daripada $10,000, beliau tetap boleh meneruskan rayuan itu atas soalan undang-undang seperti yang diperuntukkan di bawah s 28 Akta Mahkamah Kehakiman 1964 ('Akta itu'). Telah juga dihujahkan bahawa pendaftar itu tidak patut dan tidak boleh memutuskan isu sama ada terdapat satu persoalan undang-undang atau tidak kerana pada masa notis rayuan itu difailkan, memorandum rayuan, nota keterangan, dan alasan penghakiman pun tidak ada di hadapan pendaftar untuk membolehkannya memutuskan sama ada terdapat satu persoalan undang-undang yang harus diputuskan oleh Mahkamah Tinggi. Telah dihujahkan bahawa persoalan seperti itu hanya boleh diputuskan oleh Mahkamah Tinggi.

Diputuskan, menolak permohonan itu:

(1) Suatu rayuan dikatakan boleh ditujukan kepada Mahkamah Tinggi dalam maksud s 28 Akta itu apabila Pendaftar Mahkamah Tinggi menerima rekod rayuan dan mencatatnya di dalam senarai rayuan.

(2) Pendaftar Mahkamah Tinggi tidak akan melihat rekod rayuan itu jika salah satu daripada dua kelayakan dalam s 28 tidak dipenuhi. Oleh kerana itu mengikut implikasi pendaftar mahkamah di bawah mesti mempunyai kuasa untuk memutuskan sama ada notis rayuan itu pada mukanya mengandungi sebarang kelayakan itu supaya ia boleh diterima untuk difailkan.]

Legislation referred to

Courts of Judicature Act 1964 s 28
Rules of the High Court 1980 O 55 rr 1, 3
Rules of the Subordinate Courts 1980 O 49 rr 2(1), 3(1)

BM Bodipalar (*Balendran Chong Haranay & Bodi*) for the applicant.
SM Appaduray (*Ten Appaduray & Wong*) for the respondent.

Lamin J: Briefly the background to the originating motion before me is that on 1 October 1984, the plaintiff (ie the Malayan Banking Bhd) obtained a judgment in default of appearance before the Kuantan Magistrate Court in Civil Suit No 638/84 against four persons, one of whom is the present applicant who was cited as the second defendant in the said suit. On 4 April 1989, the applicant applied to set aside the judgment in default and on 1 February 1991 his application was dismissed. On 5 February 1991, the applicant's counsel filed a notice of appeal against the decision of the learned magistrate but the registrar refused to register the said notice on the

ground that the judgment sum was less than $10,000. Hence the present application praying for an order, inter alia, that the Registrar of the Subordinate Courts do receive and register the said notice of appeal.

Now, learned counsel for the applicant argued before me that it was not for the Registrar of the Subordinate Courts to interpret s 28 of the Courts of Judicature Act 1964 ('the Act'). He contended that notwithstanding that the judgment sum being less than $10,000 he could still proceed with the appeal on the question of law as was provided under the said s 28. The registrar should not and could not determine the issue as to whether there existed a question of law or not in the case because at the time of filing the notice of appeal, the memorandum of appeal, the notes of evidence and even the grounds of judgment were not before the registrar to enable him or her to determine as to whether there was a question of law to be decided by the High Court. Such a question, according to learned counsel for the applicant, can only be decided by the High Court. By then the full record of appeal would have been before the judge. I disagreed.

Section 28(1) of the Act provides:

> Subject to any other written law, no appeal shall lie to the High Court from a decision of a subordinate court in any civil cause or matter where the amount in dispute or the value of the subject matter is ten thousand ringgit or less except on a question of law.

By virtue of O 49 r 2(1) of the Rules of the Subordinate Courts 1980 ('RSC'), an aggrieved party may appeal to the High Court by filing a notice of appeal in Form 140 with the registrar of the relevant subordinate court whose decision is being appealed. It must be filed within 14 days from the date when the judgment was pronounced. Form 140 is very clear in regard to the venue of filing as the addressee is the registrar of the sessions court or of the magistrate court. Upon receipt of Form 140, the registrar will send a copy of it (after having endorsed on it the date of receipt which is called the date of filing) to the Registrar of the High Court (O 49 r 2(1) of the RSC). That is only by way of information to the High Court as only a copy is being forwarded. Only a cross-appeal, if any, is filed at the High Court (O 55 r 3 of the Rules of the High Court 1980 ('RHC')). The question is at what stage can an appeal be said to 'lie to the High Court' as required under s 28 of the Act. I say that an appeal is said to 'lie to the High Court' when the Registrar of the High Court receives the record of appeal and enters it in a list of appeals (O 55 r 1 of the RHC). The record of appeal of an appellant without the assistance of counsel is prepared by the subordinate court whose decision is being appealed (O 49 r 3(1) of the RSC), while that of an appellant with counsel will be prepared by his counsel (O 49 r 3A(1) of the RSC). Likewise in the case of the former the registrar of the relevant subordinate court will send the appeal record to the Registrar of the High Court concerned. In the case of the latter, the appellant's counsel will file the appeal record with the Registrar of the High Court. Section 28 of the Act states that 'no appeal shall lie to the High Court' meaning that no record of appeal shall be received by the Registrar of the High Court where the amount in dispute 'is ten thousand ringgit or less except on a question of law'. In other words the Registrar of the High Court shall not

have sight of the appeal record if any one of the two qualifications is not fulfilled. By implication therefore the registrar of the court below must have the power to decide whether the notice of appeal on the face of it carries any of the qualifications so that it can be accepted to be filed. Without the notice of appeal the record of appeal will be incomplete. Learned counsel for the applicant contended that the registrar of the court below cannot look at s 28 and he therefore cannot reject a notice of appeal. The simple answer to that, is that, it makes nonsense of s 28. Both the court below (in the case of an appellant without the assistance of counsel) and the appellant's counsel will have spent their time in futility in getting the record ready when the High Court in less than a second can decide to reject the appeal on the ground that it is not a fit and proper case to be brought before it as it has only to decide whether the amount in dispute is ten thousand ringgit or less or whether the appeal is on a question of law. I am of the view that in the case of an appellant intending to appeal on a question of law, the notice of appeal in Form 140 must state at least in general form the question or questions of law that he wishes to appeal on.

Learned counsel for the applicant also contended that at the stage of filing the notice of appeal, there was no way of knowing what question or questions of law intended to be pursued on appeal as the magistrate or the judge of the sessions court as the case may be had not written his grounds of judgment. Surely the counsel handling the case must know the question of law involved, if any, in his case. It is not necessary that the court below must have decided on that particular point of law for the purpose of taking it on appeal under s 28. I accordingly dismissed the application with costs.

Application dismissed.

Reported by PS Ranjan